

[REDACTED]

vs

[REDACTED]

COMPLAINT

1. On the 19th September 2023, Mr [REDACTED] (the “complainant”) lodged a complaint against the [REDACTED] (the “controller”) alleging that he was not provided with any appropriate information in relation to the processing activity conducted by means of a hand-held speed camera. The complainant contended that “[t]he Officer that took the photo was nowhere in sight, on the contrary hiding somewhere and no display signs or warning showing that a camera was been used in breach of my private life”.

INVESTIGATION

2. Pursuant to the investigation procedure of this Office, the Commissioner provided the controller with a copy of the complaint, including a request to provide submissions in order to defend itself against the allegation raised by the complainant.
3. By means of an email dated the 17th October 2023, the controller submitted the following arguments in relation to this complaint:
 - a. that the hand-held speed cameras must be distinguished from the standard fixed speed cameras which are operated by the [REDACTED]
 - b. that the standard fixed speed cameras constantly monitor the speed of all the vehicles and as a result, carry out automated technical surveillance, and thus, when a vehicle exceeds the set limit, the camera automatically detects and captures the event;

- c. that hand-held speed cameras operate differently because they are not used for constant monitoring, but these devices assist the controller in determining whether an offence has been committed;
- d. that the monitoring or surveillance is carried out physically, namely ocular, by the [REDACTED] that are present on the roads to ensure the safety and security of the public;
- e. that the hand-held speed camera has to be configured to detect a vehicle that is moving with a speed that exceeds the set limit and this is mainly due to the fact that speed can only be accurately measured by using the appropriate devices and no person can accurately measure speed to determine beyond reasonable doubt that an offence has been or is being committed without the assistance of technology;
- f. that, therefore, if the officer has a reasonable suspicion that a vehicle is driving with excessive speed, the hand-held speed camera, which is a gun-shaped device, is pointed towards the specific vehicle and if the signal (straight laser beam) hits an object that is moving with a speed over the set limit, it turns on the capturing function of the device and records a series of frames, including the relative speeds;
- g. that no information is recorded if the signal does not detect an over-speeding vehicle;
- h. that, therefore, the hand-held speed cameras are not used to surveil or monitor the movements of vehicles, but as a tool to assist the controller to confirm or otherwise the reasonable suspicion that an offence is being committed, and to capture and preserve evidence of such offence;
- i. that once the offence is confirmed, a notification of the details of the offence is transmitted to the owner of the respective vehicle by mail in terms of the Service of Notice by Mail Regulations, Subsidiary Legislation 291.03, which prescribes the procedure used to notify individuals of offences in cases of over-speeding, and the pertinent captured data are uploaded on the Law Enforcement System;
- j. that the use of hand-held speed cameras is based on regulation 127 of the Motor Vehicle Regulations, Subsidiary Legislation 65.11, and such regulation lays down the basic framework for the different type of speed monitoring devices that may be used;

- k. that the hand-held speed cameras operated by the controller have been prescribed by the Minister responsible for Transport as required by sub-regulation (4) of Subsidiary Legislation 65.11 and are calibrated biannually in accordance with the provisions of the Measurements Subject to Metrological Control Regulations, Subsidiary Legislation 454.17;
 - l. that it must be pointed out that such law does not require the placing of any signs and this is a matter that must be considered depending on the type of devices used, technology employed, and procedures adopted;
 - m. that, in the case of fixed speed cameras, a notification is necessary as all vehicles are monitored or surveilled, irrespective of whether a reasonable suspicion exists or otherwise, that a vehicle is driving with excessive speed;
 - n. that the hand-held speed cameras employed by the controller are only used to investigate specific cases on the basis of a reasonable suspicion, after or while such offences are being committed; and
 - o. that all information about the hand-held speed cameras and the processing of personal data involved in the processing activity is published online on the official website, that may be accessed on [REDACTED]
4. The complainant was provided with a copy of the submissions in order to rebut the arguments of the controller. By means of an email dated the 22nd November 2023, the complainant submitted:
 - a. that it is important that the controller informs the data subjects about the processing of their personal data pursuant to the principle of fairness and transparency; and
 - b. that the controller should provide appropriate signs to alert drivers of the use of the hand-held speed cameras whilst not affecting the safety of road users.
5. On the 29th November 2023, the controller provided its final submissions in relation to the arguments raised by the complainant:

- a. that the application of the principle of fairness and transparency cannot be viewed in vacuum, but in relation to the specific processing activity and this is because it is a principle and not a set of hard rules that must be observed according to the specificity of the situation; and
- b. that the information published online explains in detail the whole processing activity, including what prompts the controller to make use of the hand-held speed cameras, how and what information is collected at investigation stage, and how it is subsequently processed for prosecution purposes.

LEGAL ANALYSIS AND DECISION

6. For the purpose of the investigation of this complaint, the Commissioner sought to determine whether the controller is complying with its information obligations when processing personal data using hand-held speed cameras pursuant to the Data Protection (Processing of Personal Data by Competent Authorities for the purposes of the Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties) Regulations, Subsidiary Legislation 586.08 (the “**Subsidiary Legislation 586.08**”)¹.
7. During the course of the investigation, it was established that these hand-held speed cameras process the following personal data: “[t]he categories of personal data captured by HSCs is limited to images of the motor vehicle, which includes its registration plate, speed, location and time”. Pursuant to regulation 2 of Subsidiary Legislation 586.08, ‘personal data’ means “any information relating to an identified or identifiable natural person”. Recital 21 of Directive 2016/680² provides that “[t]he principles of data protection should apply to any information concerning an identified or identifiable natural person. To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly”.

¹ The information which is made available online by the controller on its website [REDACTED] states that the “processing of personal data collected via HSCs is regulated by the Data Protection (Processing of Personal Data by Competent Authorities for the Purposes of the Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties) Regulation (S.L. 586.08).”

² Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

8. The Court of Justice of the European Union (the “CJEU”) held that the definition of ‘personal data’ is *“applicable where, by reason of its content, purpose and effect, the information in question is linked to a particular natural person. In order to determine whether a natural person is identifiable, directly or indirectly, account should be taken of all the means likely reasonably to be used either by the controller ... or by any other person”*³. In this recent judgment delivered in November 2023, the CJEU ruled that a vehicle identification number (VIN) on its own is not personal data, however, it will become personal data if the controller or a third party has the means to associate that number with a specific person.
9. In the present case, the Commissioner notes that controller has the means to link the vehicle registration number (VRD) to a particular natural person, which therefore, leads to the identification of a data subject. This information coupled with the location, speed and time is deemed to be ‘personal data’ within the meaning of regulation 2 of Subsidiary Legislation 586.08.
10. Throughout the course of the investigation, the controller emphasised the distinction between fixed speed cameras and hand-held speed cameras. The controller reiterated that the standard fixed speed cameras constantly monitor the speed of all vehicles that enter the monitored zone, which means that these devices carry out automated technical surveillance. On the other hand, the hand-held speed cameras capture the data of only those drivers who exceed the speed limit on the basis of a reasonable suspicion of the [REDACTED].
11. Accordingly, the Commissioner examined the definition of ‘processing’ as set forth in regulation 2 of Subsidiary Legislation 586.08:

“processing” means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction”.

³ Case C-319/22, Gesamtverband Autoteile-Handel eV vs Scania CV AB, decided on the 9th November 2023, paragraph 45.

12. For this reason, the Commissioner clarifies that if a device is capable of carrying out an operation(s), which falls within the definition of ‘processing’, the law applies in its entirety, including the obligation to inform the data subject about the processing activity. Thus, it is unclear why the controller is making a distinction between fixed and hand-held devices when the law applies equally to all devices that perform processing operations within the meaning of regulation 2 of Subsidiary Legislation 586.08.
13. Article 8(2) of the Charter of Fundamental Rights of the European Union recognises the principle of fairness by elucidating that “*data must be processed fairly*”. However, the case-law of the CJEU does not give a very meaningful recognition to the principle of fairness as a stand-alone principle and it is often coupled with other principles, such as, the principle of lawfulness. Notwithstanding this, in recent years, the European Data Protection Board (the “EDPB”) started exploring the notion of ‘fairness’ and consequently, this principle started gaining the necessary recognition as a principle with its own independent meaning. In fact, in a recent binding decision 2/2023⁴, the EDPB found an infringement of the principle of fairness as a stand-alone principle.
14. Whereas the EDPB generally tackles the principle of fairness within the context of the General Data Protection Regulation⁵, this interpretation is still relevant vis-à-vis the application of the principle of fairness when the processing is conducted within the scope of Subsidiary Legislation 586.08. This is only insofar that the interpretation of the EDPB is seen within the context of the activities conducted by the competent authorities for the purposes set forth in Subsidiary Legislation 586.08.
15. For this reason, the Commissioner examined the EDPB Guidelines which address the principle of fairness. In the absence of a definition of the notion of fairness in the legislative text, the interpretation of the EDPB is relevant:

“As the EDPB already stated, fairness is an overarching principle which requires that personal data shall not be processed in a way that is detrimental, discriminatory, unexpected or misleading to the data subject. If the interface

⁴ Binding Decision 2/2023 on the dispute submitted by the Irish SA regarding TikTok Technology Limited (Art. 65 GDPR), adopted on the 2nd August 2023.

⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

has insufficient or misleading information for users and fulfils the characteristics of deceptive design patterns, it can be classified as unfair processing. The fairness principle has an umbrella function and all deceptive design patterns would not comply with it irrespectively of compliance with other data protection principles.”⁶ [emphasis has been added].

16. Furthermore, in the Guidelines 2/2019, the EDPB provides some elements in relation to the meaning and effect of the principle of fairness:

“the principle of fairness includes, inter alia, recognising the reasonable expectations of the data subjects, considering possible adverse consequence processing may have on them, and having regard to the relationship and potential effects of imbalance between them and the controller”⁷.

17. Not only the EDPB recognises the principle of fairness as a stand-alone principle, but also the EDPB describes the principle as an “*overarching principle*” and a principle “*which underpins the entire data protection framework*”⁸. This strongly demonstrates that the principle of fairness touches upon the very essence of the data protection legislation, which principle is reflected throughout the various provisions of the legislation. In fact, the rights of the data subjects, in particular, the right to receive information, is a measure which implements the principle of fairness. The principle of fairness requires that the data subject shall be informed of the existence of the processing operation and its purposes.

18. The principle of fairness is outlined in regulation 4(1)(a) of Subsidiary Legislation 586.08, which provides that personal data shall be processed fairly. Recital 42 of Directive 2016/680 links the principle of fairness to the information obligation:

“At least the following information should be made available to the data subject: the identity of the controller, the existence of the processing operation, the purposes of the processing, the right to lodge a complaint and the existence

⁶ Guidelines 03/2022 on Deceptive design patterns in social media platform interfaces: how to recognise and avoid them, version 2.0, adopted on the 14th February 2023, paragraph 9.

⁷ Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, paragraph 12.

⁸ Binding Decision 5/2022 on the dispute submitted by the Irish SA regarding WhatsApp Ireland (Art. 65 GDPR), adopted on the 5th December 2022, paragraph 148.

*of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing. This could take place on the website of the competent authority. In addition, in specific cases and in order to enable the exercise of his or her rights, the data subject should be informed of the legal basis for the processing and of how long the data will be stored, in so far as such further information is necessary, **taking into account the specific circumstances in which the data are processed, to guarantee fair processing in respect of the data subject**” [emphasis has been added].*

19. To this end, regulation 13(1) of Subsidiary Legislation 586.08 obliges the controller to make available at least this information: (a) the identity and contact details of the controller; (b) the contact details of the Data Protection Officer; (c) the purposes of the processing for which the personal data are intended; (d) the right to lodge a complaint with the Commissioner and the contact details of the Commissioner; and (e) the existence of rights of the data subjects. Regulation 13(2) of Subsidiary Legislation 586.08 goes a step further as it obliges the controller to give the data subject further information in specific cases. However, the information listed in regulation 13(2)(a) to (d) may be delayed, restricted or omitted if it constitutes a necessary and proportionate measure for the reasons set forth in regulation 13(3)(a) to (e).

20. Regulation 12 of Subsidiary Legislation 586.08 specifies the modalities of the right to information in order to ensure that the data subjects are informed in an appropriate manner about the processing activity. For this reason, regulation 12(1) states:

*“The controller shall take reasonable steps to provide any information referred to in regulation 13 and ensure that any communication with regard to regulations 11, 14 to 18 and 31 relating to the processing is provided in a concise, intelligible and easily accessible form, using clear and plain language. The information shall be **provided by any appropriate means, including by electronic means.**” [emphasis has been added]*

21. Subsidiary Legislation 586.08 does not prescribe the format or modality by which the information set forth in regulation 13 shall be provided to the data subject. However, regulation 12(1) obliges the controller to provide the information “*by any appropriate means*”. This requirement has to be seen within the context of the circumstances of the processing,

including the nature and scope of the processing, and the means used to process the data. In the present case, the controller stated that it had fulfilled the information requirement by publishing the information on its website [REDACTED]. However, the Commissioner does not consider this information on its own to be sufficient. The information on the website of the controller is not enabling the data subject to easily recognise the circumstances of the processing before approaching an area where hand-held devices are used by [REDACTED].

22. The Commissioner emphasises that the data subjects shall be provided with a meaningful overview of the intended processing before they enter a zone which may lead to the processing of their personal data. The informational fairness requires that data subjects are not deceived or misled on the processing of their personal data. They should be able to determine in advance what the scope and consequences of the processing entail and should not be taken by surprise about the processing of their personal data¹⁰.
23. In his assessment, the Commissioner considered the scope, context, nature and purpose of the processing and concluded that the controller is not taking reasonable steps to provide any information referred to in regulation 13 of Subsidiary Legislation 586.08 by means of a temporary sign placed within a reasonable distance before the data subjects approach an area where hand-held speed cameras are used. The lack of a temporary sign is tantamount to an unfair practice which impinges upon the fundamental right to the protection of personal data.

On the basis of the foregoing considerations, the Commissioner is hereby deciding that the controller infringed the principle of fairness and regulation 12(1) of Subsidiary Legislation 586.08 when it failed to take reasonable steps to display appropriate signs to inform the data subjects that they are approaching a zone where their personal data may be processed by means of a hand-held speed camera.

Pursuant to regulation 49(b)(iv) of Subsidiary Legislation 586.08, the controller is hereby being ordered to display appropriate signs which shall be positioned within a reasonable distance and in such a manner that the data subject can easily recognise the circumstances of the processing before approaching a zone where hand-held speed devices are used.

⁹ Last accessed by this Office on the 2nd February 2024.

¹⁰ WP260 rev. 01 Article 29 Working Party, Guidelines on transparency under Regulation 2016/679, adopted on the 29th November 2017, as last revised and adopted on the 11th April 2018, paragraph 10.



The controller shall comply with this order within a period of two (2) months from the date of receipt of this legally-binding decision and inform the Commissioner of the action taken immediately thereafter.

Non-compliance with this order shall lead to the appropriate corrective action.

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Ian Deguara
Information and Data Protection Commissioner



Right of Appeal

The parties are hereby being informed that in terms of article 26(1) of the Data Protection Act (Cap. 586 of the Laws of Malta), any person to whom a legally binding decision of the Commissioner is addressed, shall have the right to appeal to the Information and Data Protection Appeals Tribunal within twenty (20) days from the service of the said decision as provided in article 23 thereof.

An appeal to the Tribunal shall be made in writing and addressed to The Secretary, Information and Data Protection Appeals Tribunal, 158, Merchants Street, Valletta.